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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BULLARD INDEPENDENT SCHOOL DISTRICT, ET AL,
Petitioners,

v.

JAMES N. BROWN
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are:

1. Whether the "speech" which forms the basis of respondent's cause of action qualified for protection under the First Amendment. More particularly, under the guidelines of *Pickering* v. *Board of Education*, 88 S.Ct. 1731, 391 U.S. 563, 20 L.Ed.2d 811 (1968), whether the "speech" at issue:

   (a) was made by respondent as a citizen or member of the general public, and

   (b) was made upon a matter of public concern or upon an issue of public importance.

2. Whether the trial court erred *vis a vis* the holding in *Mt. Healthy City Board of Education* v. *Doyle*, 97 S.Ct. 568, 429 U.S. 274, 50 L.Ed.2d 471 (1971), by charging the jury that:

> "**** if Phillip Irby or Edward Coffey or the Bullard Independent School District or any of its individual Trustees, took actions which were taken because James Brown exercised his First Amendment activities *or even partially* for that reason, the Defendants acted illegally." (Tr. 523, emphasis added.)

LIST OF PARTIES

The following are the parties in the trial court and in the appellate court whose judgments are sought to be reviewed:

1. James N. Brown.
2. Bullard Independent School District*.
3. Phillip Irby.
4. Edward Coffey.

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* While independent school districts have some characteristics of municipal corporations in Texas, Bullard Independent School District has no parent corporations, subsidiaries, or affiliates. Rule 28.1, *Rules of the Supreme Court of the United States.*

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To The Honorable Supreme Court of The United States:

Come now Bullard Independent School District, Phillip Irby, its former superintendent, and Edward Coffey, a principal in the district, pursuant to Rule 21, *Rules of the Supreme Court of the United States,* and petition for writ of certiorari to review a decision and judgment of the Court of Appeals for the Fifth Circuit:

REFERENCE TO OFFICIAL REPORTS

The decision of the court of appeals is officially reported as: *Brown* v. *Bullard Independent School District, et al,* 640 F.2d 651 (5th Cir. 1980).

GROUNDS OF JURISDICTION

The jurisdictional bases upon which the petition is founded are:

1. The opinion and judgment of the court of appeals are dated March 25, 1981. (See Appendix A & B.)

2. A timely motion for rehearing was overruled by the court of appeals on April 17, 1981. (See Appendix C.)

3. Under *28 U.S.C., § 2101(c)*, the time period for filing this petition runs to July 16, 1981. The mandate has been stayed by the lower court to and including May 30, 1981.

4. The jurisdiction of the court is invoked under *28 U.S.C., § 1254(1).*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of law applicable to this case are:

1. The First Amendment to the Constitution of the United States which, in pertinent part, provides:

> "**** Congress shall make no law abridging . . . the freedom of speech ***."

2. The Fourteenth Amendment to the Constitution of the United States to the extent that the following language makes the First Amendment freedom quoted above applicable to the states:

> "**** No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive

any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. The familiar language of *42 U.S.C.*, § *1983*, which provides the following federal cause of action:

> "Every person who, under color of any statute . . . of any State or Territory, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress."

STATEMENT OF THE CASE

James Brown brought this suit under *42 U.S.C.*, § *1983*, alleging he was disciplined in and finally not rehired to his position as a public school teacher in the Bullard Independent School District, because of his exercise of speech protected by the First Amendment. (R. 78-82.)* Defendants to this suit are the school district (by and through its trustees), Phillip Irby, a superintendent who placed Brown on "probation" and later recommended his contract not be renewed, and Edward Coffey, whose relation to the events is remote; he participated in some of the administrative decisions affecting Mr. Brown.

Although remanding on an attorneys fee point not involved here, the Court of Appeals affirmed the liability aspects of the following — described judgment. (Appendix A.)

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* "R" references are to the volume of pleadings and other legal instruments. "Tr." refers to the transcript of testimony. For clarity, the parties will be referred to by proper name or by trial court designation.

The case was tried to a jury which answered special interrogatories favorable to Mr. Brown. (R. 3.)* The trial court disregarded certain findings of punitive damages (R. 3-5), but otherwise entered judgment on the verdict for $17,500.00, after reducing lost wages by sums earned in mitigation. Equitable reinstatement, attorney's fees, and costs were also awarded. (R. 4-5.)

Briefly, the factual basis for the cause of action is as follows:

A. Facts Giving Rise to the Controversy.

The signal event in this case is a routine faculty meeting in which Brown, prompted by an admitted personal resentment against Superintendent Irby (Tr. 173, lines 12-17), directed certain innocuous comments at the process for teacher evaluation. (R. 172-173.) Brown claimed First Amendment protection for this "speech" and sued on the ground that its utterance caused the school district to "probate" him and, later, not to renew his teaching contract. (R. 50, 78-82.)

It is helpful to cast these comments against the immediate history leading up to the meeting in which they were made and the nature of the relationship between Brown and the school district's administrative staff, to wit:

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* Summarized, the verdict was: (1) Brown's non-renewal violated his First Amendment rights. (2a) Irby and Coffey were not entitled to "good faith" immunity. (2b) The majority trustees voting for non-renewal were not entitled to "good faith" immunity. (3) Irby and Coffey acted with malice toward Brown. (4-6) Brown's damages were $22,000 lost wages, $7,500 mental anguish, and $7,500 punitive damages against Irby and Coffey. (R. 3.)

1. *Events Prior to November 18, 1976:* Bullard hired Phillip Irby in 1975 as its superintendent. (Tr. 238.) A principal objective of his employment was to remedy a conspicuous looseness in the organization and operation of the district; particularly, it was hoped that he could effectuate a credible teacher evaluation system to correct a " *** certain laxity *** " in teacher performance. (Tr. 239, 319, 350.)

Irby's first encounter with Brown was both auspicious and indicative. Importuned to augment Brown's income via a school bus driver's position (Tr. 240-241), Irby arranged for Brown to have a "half route". In repayment for this kindness, Brown only thumbed his nose and demanded a "whole route" or nothing at all (Tr. 156) — which Irby ultimately arranged. (Tr. 156, 241.)

Matters did not improve from that rocky start. The ensuing differences with Brown over his teaching performance, his attitude, his contribution to a harmonious working atmosphere, his compliance with school policy, and his disrespect for the administration are too numerous to detail without unduly lengthening the petition, but include:

(i) *Teaching deficiency:* Brown was noted to have teaching deficiencies, such as an inability to communicate math concepts (Tr. 243, 262), substandard, halfhearted classroom preparation (Tr. 255-256, 277, 339, 346), failure to effectively "teach" in the classroom (Tr. 245, 279, 328, 338, 343), lack of individual attention to students' unique learning abilities or difficulties (Tr. 253, 274, 344), failure to use visual or other teaching aids (Tr. 274-275), and maintenance of a sterile or

" *** drab *** " teaching atmosphere in the classroom. (Tr. 274-275, 323.) These matters were the object of considerable public complaint (twice as great as any other teacher in the system — Tr. 244, 321) and open concern by the trustees. (Tr. 244, 262, 267-268, 352, 369, 385, 394, 408.)

(ii) *Discipline; classroom control:* It was equally noted that Brown's classrooms were unruly, boisterous, and uncontrolled (Tr. 243, 274-275, 335, 337), punctuated with inappropriate insults, bickering, name calling, and joking between teacher and student. (Tr. 246-247, 274-275, 321-322, 329, 335, 337, 339.) These matters, too, were the subject of public complaint and repeated discussion with the plaintiff as needed areas of improvement. (Tr. 246-247, 274-275, 321-322, 329, 335, 337, 339.)

(iii) *Defiance of policy and authority:* The administration was also bothered by what it perceived to be Brown's persistent refusal to comply with district policy and simple directives of the administration regarding energy conservation (Tr. 249), equipment usage reports (Tr. 287), classroom cleanliness (Tr. 276), required covering of books (Tr. 275, 323), procedures for dusting erasers (Tr. 286-287), playground and recreation times (Tr. 330), proper channels of communication (Tr. 85-87, 272-273), and required hours of work. (Tr. 330.) So perplexing was this problem, an assessment of Brown's behavior and attitude by his superior was that: " *** It seemed like anything we asked him to do, he would do just the opposite to . . . defy authority *** ". (Tr. 287, lines 2-3.)

The foregoing matters were the subject of concern (Tr. 243-250), and, finally, a formal evaluation was

held in February of 1976 in which certain of the weaknesses were noted. (PX 2.) From an administrative viewpoint, things did not improve after the February evaluation. (Tr. 252.) An informal conference was held in May of 1976 between Superintendent Irby and Brown during which problem areas were reiterated. (Tr. 252-254.) At this session, Brown refused to acknowledge deficiency or need for improvement but turned the affair into a forum for venting his personal resentment against the superintendent and his resistance to administrative control in general (Tr. 255-256); e.g., he accused Irby of using Bullard as a " *** stepping stone *** " to advance his career and, by reason of being subjected to evaluation by Irby, Brown called him an " *** autocrat *** ". (Tr. 254.) The meeting ended with a warning to Brown that he must improve and would be evaluated again in the fall. (Tr. 254.)

The following school year (1976-77) commenced with the Trustees, in open meeting, expressing serious concern (uninfluenced by the superintendent) over Brown's inability to communicate math concepts and relate to his students. (Tr. 162, 351-352, 367, 394, 408.) Principal Coffey thereafter undertook regular observation of Brown's classroom and noticed no improvement in the problem areas. (Tr. 319, 328.) Coffey's criticisms and suggestions for betterment were met with a failure to admit deficiency or effectuate improvement. (Tr. 321-322.)

This was the state of affairs, from the administration's vantage point, which existed on November 18, 1976, the day of the fabled faculty meeting which is the core of Brown's suit.

2. *The Faculty Meeting Incident.* The faculty meeting of November 18 was a regular meeting with no special purpose other than to discuss general school matters. (Tr. 113.)

In the midst of a discussion concerning Bullard's sick leave policy, one teacher questioned the logic of permitting leave for illness or death of one class of relative but not another. (Tr. 114-115, 265-266, 323-324.) As sick leave was a state-wide policy, Mr. Irby remarked that the teacher's agonizing was a bit " *** nit-picking *** " on a matter over which the local district had no control. (Tr. 265-266.)

At this juncture, suddenly and without provocation, Brown blurted out that he thought the administration was " *** nit-picky *** ". (Tr. 115.) When pressed further (Tr. 266), Brown stated that " *** some of the things on our teacher evaluation could be considered nit-picky *** ". (Tr. 115.) Perhaps this incident, which surely lasted less than 15 seconds, is best described in plaintiff's own words:

> "A To the best of my recollection I said, 'Mr. Irby, we feel — I feel that the administration is sometimes picky.'
>
> * * * * *
>
> "Q All right, sir. What did he do?
>
> A He asked me to explain.
>
> Q Go ahead.
>
> A I told him that I thought some of the things on our teacher evaluation could be considered nit-picky.
>
> Q And did you explain any further?

A He made the statement that we're not here to argue about that, and that was all that was said. ***" (Tr. 114, lines 19-21; Tr. 115, lines 8-15.)

The parties stipulated that the object of Mr. Brown's remarks was the content of evaluation forms employed by the administration in the teacher evaluation process. (Pre-trial Order — Statement of Uncontested Facts, #13, R. 52.)

That innocuous episode is the *cause celebre* which has marshalled the forces of the judicial process against defendants. Brown claims he was told a probationary status given him the day after the faculty meeting was " *** because of *** " his comments (Tr. 118); he claimed further that these remarks were the motivating factor behind the subsequent non-renewal of his contract. (Tr. 520.)* The probation and failure to rehire are not disputed; the motivation behind them is.

Brown's supposition of retaliation was vehemently denied by defendants. (Tr. 277, 284-286, 305-306, 350-428.) However, defendants are not asking the court to

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* The remarks at the faculty meeting were the only speech put in issue by the pre-trial order, the evidence, and the argument. (See R. 53-54; Tr. 483-495, 511-519.) However, the district court charged that, in addition, also protected were Brown's " *** private conversations had with the Principal, the Superintendent, the Trustee members which were related to the conditions of his employment ***." (Tr. 522.) As these "*** conversations ***" are nowhere defined, either in pleading, evidence, or argument, as the basis for the cause of action, defendants cannot explicitly detail them or discuss them intelligently for the court. We treat them throughout the petition as an amalgam of the ordinary, daily conversations and discussions Brown had with the superintendent, the principal, or the trustees concerning his job performance and/or the basis for his non-renewal.

resolve a factual dispute. In the legal syllogism underlying Brown's case, the question of cause and effect is secondary to the question of First Amendment protection, i.e., whether the "speech" at issue comes within the ambit of the First Amendment. *That* is the first issue defendants raise.

B. The " * even partially *** " Charge.**

The second thrust of the petition focuses upon that portion of the charge by which the district court, erroneously we believe, told the jury:

> "*** if Phillip Irby or Edward Coffey or the Bullard Independent School District or any of its individual Trustees, took actions which were taken because James Brown exercised his First Amendment activities or *even partially* for that reason, the Defendants acted illegally." (Tr. 523, lines 8-14, emphasis added.)

Defendants submit that a charge which brands conduct as " *** illegal *** " when " *** partially *** " influenced by the exercise of protected speech flaunts the holding in *Mt. Healthy*, supra, and denies defendants benefit of the two-prong test enunciated in that decision.

C. Procedural Context in which the Points were Raised.

The points presented here were raised in the following manner:

1. *First Amendment Issue:* The First Amendment issue was raised in defendant's motion for instructed verdict (Tr. 212-216), subsequently renewed (Tr. 481-482), with the following assignment:

> "*** under the balancing of interests test this is clearly the sort of conduct that is not protected by the First Amendment, Freedom of Speech provision." (Tr. 216, lines 2-6.)

Both motions were overruled. (Tr. 223-224, 482.)

2. *The "*** even partially ***" Charge:* In conformity with Rule 51, *Federal Rules of Civil Procedure*, defendants objected to the "*** even partially ***" test of illegality on the ground that:

> "*** a partial retaliation is not the standard or measure that should be used under the *Mount Healthy* case, but on the contrary, such conduct is required to be the motivating cause for the action taken." (Tr. 538, lines 1-7.)

This objection was, also, overruled. (Tr. 539.)

REASONS WHY THE WRIT SHOULD ISSUE

I.

PLAINTIFF'S SPEECH WAS NOT CONSTITUTIONALLY PROTECTED, EITHER PER SE OR ON BALANCE.

The threshold burden of a plaintiff in these cases is to prove protected speech is the root cause of the conduct condemned. As succinctly put in *Mt. Healthy City Board of Education* v. *Doyle*, 97 S.Ct. 568, 429 U.S. 574, 50 L.Ed.2d 471 (1977):

> "*** Initially . . . the burden was properly placed upon respondent to show that his conduct was protected ***." (429 U.S. 287, 50 L.Ed.2d 450.)

As is revealed by analysis of *Perry* v. *Sindermann*, 92 S.Ct. 2694, 408 U.S. 593, 33 L.Ed.2d 570 (1972) and

Pickering v. *Board of Education*, 88 S.Ct. 1731, 391 U.S. 563, 20 L.Ed.2d 811 (1968), ascertainment of First Amendment protection is a two-step process which asks these questions:

(i) Whether the speech is protected *per se*, i.e., considered on its own, and

(ii) if so, whether it is protected in context, i.e., whether the legitimate ends of the school in promoting "*** efficiency of the public services it performs through its employees *** ", *Pickering*, supra, 391 U.S. 568, 20 L.Ed.2d 817, outweighs the teacher's right of expression.

Defendants contend that the speech which supports the cause of action does not meet either standard, to wit:

A. ***The Speech Per Se:*** One element which rings loud and clear from *Pickering* and *Sindermann* is that, judged alone, a public employee's speech must be transcendent in character before it assumes a constitutional mantel. In defining the character of a public employee's speech subject to protection, the repeated use, in those cases, of such phrases as "general public interest", "legitimate public concern", "issues of public importance",* and "matters of public concern"** make it manifest that protected employee's speech must attain a loftiness amounting to more than verbalization of one's pique on mundane or routine matters personal only in quality. Likewise, in characterizing the stance from which such speech issues, the use of phrases such

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* 391 U.S. 568, 571, 573, 574, 20 L.Ed.2d 817-821.

** 408 U.S. 598, 33 L.Ed.2d 578.

as "interest of the teacher, as a citizen" and "member of the general public"* makes it equally clear that the speech must be motivated from beyond one's uniquely personal situation, i.e., its exercise must have its roots in the broad rights of citizenship.

Concedely, the relation of teacher and school district may involve public issues which affect citizens generally. In *Pickering*, for example, the speech concerned school funding which had been the object of heated public debate and a disputed public bond issue. In *Sindermann* the issue related to a teacher's rights to debate publicly and participate as a citizen in passage of legislation vital to his interests. *Givhan*** involved criticism of school policy believed to foster racial discrimination — a vital public issue generally, but more acute in that case since the school was under a desegregation order.

There is no requisite nexus of comment and public issue, no legitimate urging of a fundamental right of citizenship in Brown's " *** nit-picky *** " comment or in any of the " *** private conversations *** " he may have had with school officials. There is no evidence that the general *subject* of teacher evaluation was a public issue in the Bullard District. There is no evidence that the *procedures* for teacher evaluation were the center of controversy among teachers themselves, or teachers and the administration, much less the subject of public controversy. On a much lower level, there is no evidence that the *contents* of a teacher evaluation form had achieved or could achieve

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* 391 U.S. 568, 573, 20 L.Ed.2d 817, 820.

** *Givhan* v. *Western Line Consolidated Independent School District*, 99 S.Ct. 693, 439 U.S. 410, 58 L.Ed.2d 619 (1979).

the exalted status of a public issue, yet, it is precisely at this lowest level at which Brown's comments were aimed; recall he stipulated that the remarks at the November 18 meeting were verbal complaints " *** about teacher evaluation forms *** ". (Pre-trial Order, Stip. #13, R. 52.)

Nor is there any concealing the stance from which the faculty meeting comments were made.

Brown confessed his curious personal resentment of Superintendent Irby for the latter's choice of residence and his conclusion that the superintendent was using Bullard as a " *** stepping stone *** " to further his career. (Tr. 110-111, 158, 254.) Significantly, he confessed his " *** nit-picky *** " comments were an emotional outcropping of that personal resentment. He testified:

> "Q *** When Mr. Irby made the remark, that this discussion about sick leave had become picky, this prompted you to let your old resentments against Mr. Irby come out in this voluntary statement in the faculty meeting; is that right, sir?
>
> "A Yes. ***" (Tr. 173, lines 12-17.)

Viewing Brown's " *** nit-picky *** " comment in its most charitable light, ascribing to it the most laudatory, far-reaching purpose possible, still, it rises no higher than a comment upon a uniquely internal, indeed esoteric, subject matter, and it appears decidely to have been made from a personal stance for perculiarly personal reasons with an isolated personal target (the superintendent) as its object.

To classify such comments as involving a matter of public importance made to vindicate fundamental

rights of citizenship is virtually an affront to the legitimate rights protected by the First Amendment. Clearly, neither the quality of the comments' subject matter nor the stance from which they were made qualifies them under the *Pickering/Sindermann* standards. The same would be true (even more so) of the so-called "*** private conversations ***". See *Schmidt* v. *Freemont County School District, etc.*, 558 F.2d 982, 984-985 (10th Cir. 1977); *Chitwood* v. *Feaster*, 468, F.2d 359, 360-361 (4th Cir. 1972); *Butler* v. *Hamilton*, 542 F.2d 835, 838 (10th Cir. 1976); *Marwil* v. *Baker*, 499 F. Supp. 560, 571 (D.C. Mich. 1980).

B. The Speech on Balance: If Brown's speech should be protected *per se*, surely, the now-famous *Pickering* balance, stated below, removes that protection, because:

> "*** the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." (391 U.S. 568, 20 L.Ed.2d 817.)

In striking the requisite balance, in law, these undisputed factors are important here:

(i) Bullard is a small school system where harmonious working relationships and a ministration/teacher cooperation are at a premium.

(ii) Bullard had experienced a laxity in teacher performance and was legitimately entitled to designate

teacher evaluation, team spirit, and harmonious working relationships as high priorities.

(iii) Brown's "*** nit-picky ***" comments at the faculty meeting did not emanate from his posture as a citizen seeking to vindicate classwide rights, but were the product of admitted personal resentment stemming from application of administrative standards to his personal conduct and performance, making his "speech" that type of personal attack or internal matter put outside the realm of First Amendment protection by *Pickering*.

(iv) The "*** nit-picky ***" comments occurred in a closed meeting devoted to administrative matters and related to classically internal issues.

(v) The faculty meeting comments were but a small portion of a long series of disputes and difficulties between Brown and the administration confined to Brown's attitude, conduct, and proficiency, but unrelated to any overriding public issue.

(vi) The "other conversations" shown by the record are no more than what is described in the cases as bickering, running disputes and strained relationships the product of purely personal, internal differences. *Chitwood* v. *Feaster*, supra at 360-361; *Butler* v. *Hamilton*, supra, at 838.

Weighing the vested interest of Bullard in promoting effective education through qualified teachers against the non-public, internally-oriented, personally motivated comments by Brown in the faculty meeting and, particularly, adding to that balance the inopportune timing and setting of the comments, a critical factor

added to the weighing process by the *Givhan* decision,* the balance tips heavily in Bullard's favor, clearly permitting it to take into consideration Brown's comments, and especially the attitude reflected thereby, in its employment decisions. On balance, the comments were not protected. *Chitwood* v. *Feaster*, supra, 468 F.2d 359 (4th Cir. 1972); *Butler* v. *Hamilton*, supra, 542 F.2d 835 (10th Cir. 1976); *Clark* v. *Holmes*, 474 F.2d 928 (7th Cir. 1972), cert. den. 411 U.S. 972; *Janusaitis* v. *Middleberry Volunteer Fire Department*, 607 F.2d 17 (2nd Cir. 1979). The same is true of the "*** private conversations ***", whatever they may be, for the reasons expressed in *Butler* v. *Hamilton*, viz: Teachers whose jobs are terminated because of "*** strained relationships, continuing disputes, [and] repeated allegations ***" are "*** deprived of no constitutional rights. ***" (542 F.2d 838.) Cfr. *Chitwood* v. *Feaster*, supra, at 360-361.

CONCLUSION

It is no secret that Brown, in the final analysis, espouses a rule which says that *no* public employment decision may be based upon any aspect of the spoken word, regardless of how such speech may reflect upon ability, attitude, and working relationships. Such a view is at the core of the judgments below, but it is not the rule of *Pickering*, *Sindermann*, and *Mt. Healthy*. Nor should it be!

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* "Private expression, however, may in some situations bring additional factors to the *Pickering* calculus. When a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time, and place in which it is delivered."

If one accepts the tenet that the public has a legitimate interest in dispensation of quality education through capable teachers, surely it is constitutionally permissible for a school system to evaluate teachers on the basis of what they "say". Indeed, how can a teacher's ability to communicate with students be judged separate and apart from what he says in teaching? How can the spirit of cooperation and conformity to the appropriate ends which a school system seeks to achieve be determined if not partially on verbal pronouncements reflective of teacher attitude? How can a harmonious educational atmosphere be maintained in promoting an efficient, effective school system if teacher utterance at odds with those ends cannot play a part in staffing decisions?

If the type of speech involved here cannot be the basis of employment decisions, we have progressed far beyond the concern expressed by this court in *Mt. Healthy*, supra, that a teacher could be placed "*** in a better position ***" by the exercise of speech (429 U.S. 285, 50 L.Ed.2d 482). We have come, instead, to a point where teachers can *never* be evaluated, disciplined, dismissed, or non-renewed, as any such employment decision would inherently and ultimately involve the spoken word. As cogently warned in *Chitwood* v. *Feaster*, supra, a teacher "*** does not immunize himself against loss of his position simply because his non-cooperation and aggressive conduct are verbalized." (468 F.2d 360-361, emphasis added.)

II.

THE CHARGE THAT DEFENDANT'S ACTIVITIES WERE ILLEGAL IF TAKEN " *** EVEN PARTIALLY *** " IN RETALIATION WAS ERRONEOUS.

Under *Mt. Healthy*, plaintiffs in these cases, first, must (i) prove that the exercise of a First Amendment right was a "*** substantial ***" or "*** motivating ***" factor inducing retaliation, whereupon (ii) the employer may defend by proof that it would have taken the same action "*** even in the absence of the protected conduct." (429 U.S. 287, 50 L.Ed.2d 484.) Cfr. *Goss* v. *San Jacinto Junior College*, 588 F.2d 96, 99 (5th Cir. 1979); *Hastings* v. *Bonner*, 578 F.2d 136, 141 (5th Cir. 1978); *Meyr* v. *Board of Education of Affton School District*, 572 F.2d 1229 (8th Cir. 1978).

There are two conspicuous and fatal flaws in the trial court's "*** even partially ***" charge when measured by the foregoing standard, to wit:

First of all, the word "substantial", which *Mt. Healthy* equated with "motivating", means "real", "true", or "of considerable size or amount". *Webster's New Twentieth Century Dictionary (Unabridged 2nd Ed.)*, World Publishing Co., 1971, p. 1817. Those two words require, as a standard of liability, unconstitutional conduct which is more than a trivial, incidental, or remote factor. Had this court wished the first prong of the *Mt. Healthy* test to cover action prompted to *any degree* by First Amendment exercises, it could have adopted as a test the FELA standard of "*** in whole or in part ***". Use of the words "substantial" and "motivating" signifies a conscious adoption of a more

onerous standard which can accommodate a result partially caused or influenced by First Amendment conduct without actually running afoul of the constitution. This is obviated by the Court's holding that:

> "*** the difficulty with the rule enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision — even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. ***" (429 U.S. 285-286, 50 L.Ed.2d 483.)

The word "partially", which the trial court charged as a standard for liability, on the other hand, commonly means "*** in part, not total ***". *Webster's* id., at p. 1306. Its utilization here meant the jury could find defendants liable if it believed their decisions were based even one-half of one percent on First Amendment assertions. That is, quite frankly, irreconcilable with the *Mt. Healthy* requirement that the protected conduct be "substantial" or "motivating" in the employment decision. The requirement of such a lesser degree of causation severely, and in prejudice to defendants, reduced Brown's burden of proof.

The second problem with the " *** even partially *** " charge is the juxtaposition of the word "partially" with "illegally". That implied to the jury that defendants had committed a § 1983 violation (i.e., that they " *** acted illegally *** '), if it were found their conduct was motivated to *any degree* by retalia-

tion. But the second prong of the *Mt. Healthy* doctrine anticipates or assumes that conduct in question *is* motivated, to some extent, by First Amendment considerations, so there can be no reconciliation between the approved defense and a charge like the one given here which renders a defendant liable for a degree of conduct considerably less than "substantial".* Ergo, the court's charge literally obliterated defendants' affirmative, second-prong defense.

Courts which have considered this problem agree with defendants. In *Williams* v. *Day*, 553 F.2d 1160, 1162 (8th Cir. 1977), the court commented that a " *** partial factor *** " test was " *** subject to evaluation *** " in light of *Mt. Healthy*. In *Stoddard* v. *School District No. 1, Etc.*, 590 F.2d 829 (10th Cir. 1979), an " *** even in part *** " charge was found to be erroneous *vis a vis Mt. Healthy*. The court in *Selzer* v. *Fleisher*, 629 F.2d 809 (2nd Cir. 1980), on its own motion, noted that a " *** caused or contributed *** " standard of causation " *** misstated the law by setting too low a level of proof required for liability *** "; that it " *** casts too broad a net and should

* The distinction was crucial in this case. Mr. Irby was candid to say that Brown's faculty meeting remarks were influential in the later probation to the extent "*** it reminded me . . . that this is the man I had talked to much earlier, and I needed to and had told him that I would evaluate him in the fall, ***". (Tr. 305.) Such motivation clearly condemned by the court's charge is just as clearly permissible under *Mt. Healthy*. ["*** (the) candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision." (429 U.S. 286, 50 L.Ed.2d 483.)]

have omitted the italicized phrase "***". (629 F.2d 809, n. 1.)

The decision below, standing at odds with those holdings, creates a conflict among the circuits on an issue of constitutional dimension which should have uniform application in all circuits. As the Fifth Circuit's approved standard is clearly wrong, defendants were denied a proper submission of the basic question of liability, and the cause should at least be reversed for that error. Rules 51 & 61, *Federal Rules of Civil Procedure; Stoddard* v. *School District No. 1, Etc.*, supra at 834.

WHEREFORE, PREMISES CONSIDERED, petitioners pray that their petition be granted, that the case be set down for briefing and oral argument, and, upon final hearing, that the judgments of the courts below be reversed and the cause remanded for entry of judgment that respondent take nothing or, alternatively, for retrial. Petitioners additionally pray for such other and further relied to which they may justly be entitled at law or in equity.

Respectfully submitted,

MICHAEL A. HATCHELL

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit has been served upon counsel for respondent, Mr. Larry R. Daves, Attorney at Law, P. O. Box 1115, Tyler, Texas 75710, by placing same in the United States mail, properly addressed and postage prepaid, on this the 26th day of May, 1981.

MICHAEL A. HATCHELL

APPENDICES

Appendix A: **The Opinion of the Court of Appeals.**

Appendix B: **The judgment of the Court of Appeals.**

Appendix C: **Order of the Court of Appeals or Motion for Rehearing.**

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

Unit B

March 25, 1981

NO. 79-3476

JAMES N. BROWN

Plaintiff-Appellee
Cross-Appellant,

VS.

BULLARD INDEPENDENT SCHOOL DISTRICT, ET AL,

Defendants-Appellants
Cross-Appellees.

Appeal from the United States District Court for the Eastern District of Texas

---

Before AINSWORTH and SAM D. JOHNSON, Circuit Judges, and HUNTER*, District Judge.

PER CURIAM.

This case arose out of the non-renewal of the contract of an untenured public school teacher. James Brown

* United States District Judge of the Western District of Louisiana, sitting by designation.

brought suit against the Bullard Independent School District and its trustees, both officially and individually, for monetary damages and equitable relief stemming from the district's failure to renew his contract as a non-tenured teacher for 1977-78, alleging that he was denied renewal of his contract in retaliation for his exercise of First Amendment rights. The same relief was sought against Phillip Irby, the superintendent, and Edward Coffee, plaintiff's supervising principal. Defendants requested and were granted a trial by jury. The jury's findings, in response to special interrogatories, are summarized as follows:

Question 1 The jury found that James N. Brown's non-renewal was in violation of Mr. Brown's rights under the First Amendment.

Question 2a The jury found Phillip C. Irby and Edward F. Coffee, school administrators, were not entitled to a "good faith" immunity defense from individual liability.

Question 2b The jury found that George M. Arnold, Bob Coleman, David Campbell, and Kenneth King, members of defendant school board, were not entitled to a "good faith" immunity defense from individual liability.

Question 3 The jury found that Phillip C. Irby and Edward F. Coffee acted with malice, ill will, or the specific purpose of violating Mr. Brown's First Amendment rights.

Question 4 The jury found that $22,000 would fairly and reasonably compensate Mr. Brown for his lost wages.

Question 5 The jury found that $7,500 would fairly and reasonably compensate Mr. Brown for the

mental anguish caused by the denial of his First Amendment rights.

Question 6 The jury found that punitive damages should be assessed against Phillip C. Irby and Edward F. Coffee in the amount of $7,500.

The ultimate judgment, partially sustaining defendants' motion for judgment non obstante veredicto, disregarded the punitive damage finding, mitigated lost wages by the sum of plaintiff's post-teaching earnings and awarded plaintiff $17,500, plus attorney's fees of $5,000. Equitable relief in the form of mandatory reinstatement was also ordered.

Defendants insist that the judgment must be set aside in its entirety because the speech involved was not protected by the First Amendment and that the record will not support a judgment premised upon an unconstitutional retaliation. Plaintiff has filed a cross-appeal contending that this Court should a) affirm the jury and trial court's judgment against each defendant, and b) reverse and remand the trial court's disregard of punitive damages and award of attorney's fees.

[1, 2] Defendants insist that the statements alleged to have caused plaintiff's negative evaluation and non-renewal were not protected speech under the First Amendment. Defendants' position is no different now than it was in the district court, i.e., in context, plaintiff's statements were not protected because they involved internal matters relative to efficient functioning of the school system and were not related to any issue of public importance upon which plaintiff was commenting as a citizen. We regard the ultimate deter-

mination of whether an individual's speech was constitutionally protected "to be a question of law," *Van Ooteghem* v. *Gray*, 628 F.2d 488-492 (5th Cir. 1980). However, in balancing the interests discussed in *Pickering* v. *Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734-35, 20 L.Ed.2d 811 (1968), in order to assess the protected nature of a given speech, an appellate court is constrained, absent, clear error, to follow the trial court's conclusions. Here, the trial court instructed the jury:

> The evidence in this case has established as a matter of law the following protected activities: private conversations he had with the Principal, the Superintendent, the Trustee members which related to the conditions of his employment, and remarks that he made at a faculty meeting on November 18, 1976. Each of these activities taken individually or collectively are protected First Amendment activities.

Based on the facts of this case, we cannot find that his conclusions were erroneous.

SUFFICIENCY OF THE EVIDENCE

[3] Concerning the evidentiary burdens of the parties, the rules are simple enough. Under *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1971), the plaintiff, first, must (i) prove that exercise of a First Amendment right was a "... substantial ..." or "... motivating ..." factor inducing the supposedly retaliatory acts complained of, whereupon (ii) the defendants may prove that they would have taken the same actions

"... even in the absence of the protected conduct." 429 U.S. 287, 97 S.Ct. 576, 50 L.Ed.2d 484.[1]

In *Boeing Co.* v. *Shipman*, 411 F.2d 365 (5th Cir. 1969) *en banc*, we established the standards governing judgments n.o.v.:

> On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence — not just that evidence which supports the non-mover's case — but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight

1. The jury was given specific instructions concerning the issues presented by Interrogatory One. They were told:

> "If James Brown's actions or statements in connection with his protected First Amendment activities were a substantial or motivating factor in any of the decisions that Mr. Irby, Mr. Coffey or the Bullard Independent School District or its individual Trustees made with reference to his employment, then the Defendants acted illegally and contrary to the Constitution of the United States. The burden of proof in this connection is on the Plaintiff, James Brown, to prove his allegations to you by a preponderance of the evidence.
>
> "On the other hand, if Mr. Irby, Mr. Coffey, Bullard Independent School District or the individual Trustees can establish that the action which they took with reference to James Brown would have been taken in any event; that is, even if he had never made those remarks on November 18, 1976, or had any conversations regarding his employment with Mr. Irby: then there is no violation of the law."

that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury.

[4] In response to interrogatories the jury found that Brown's non-renewal was in violation of his rights under the Fifth Amendment; that the school administrators were not entitled to "good faith" immunity defense, and that the school board members were not entitled to a "good faith" immunity defense. There was conflicting testimony on all of these issues. While the evidence for defendants was persuasive, the evidence for plaintiff was substantial and also persuasive. Faced with conflicting credible evidence, it was within the jury's province to resolve the conflict in favor of plaintiff. Denial by the trial court of defendants' motion for directed verdict and judgment n.o.v. was not in error.

PUNITIVE DAMAGES

[5] The Supreme Court noted in *Carey* v. *Piphus*, 435 U.S. 247, 257, n.11, 98 S.Ct. 1042, 1049, n.11, 55 L.Ed.2d 252, that punitive damages may be awarded in appropriate cases under Section 1983. In the present case the district judge declared that punitive damages as assessed by the jury were disregarded for the reason that the evidence was insufficient to support such an award. The jury, encountered difficulty in agreeing on the punitive damage interrogatory.

Plaintiff's suit involves no class-wide wrong; there was no systematic oppression or a continuous course of harassment. We have again examined the record under

the *Boeing* standard, and viewing the evidence and making reasonable inferences in the light most favorable to plaintiff, we conclue that there is simply no evidence of the type of malevolent, outrageous or abusive conduct which justifies more than compensatory damages. The district court properly granted the motion for judgment n.o.v. on the issue of punitive damages.

ATTORNEY'S FEES

[6] Defendant's requested and were awarded attorney's fees under 42 U.S.C. § 1988. Section 1988 provides for attorney's fees at the Court's discretion to prevailing parties in suits brought under certain of the civil rights laws, including 42 U.S.C. § 1983. This circuit has consistently held that prevailing parties are ordinarily entitled to attorney's fees "unless special circumstances would render such an award unjust." *Criterion Club of Albany* v. *Board of Commissions*, 594 F.2d 118, 120 (5th Cir. 1979). To deny attorney's fees in this case would contravene the very purpose for which section 1988 was designed — to encourage plaintiffs deprived of constitutional rights to seek redress. *Gore* v. *Turner*, 563 F.2d 159, 163 (5th Cir. 1977). The fee awarded was in the amount of $5,000. Plaintiff insists that it was inadequate. The district court failed to explain how it arrived at this figure and made no reference to the guidelines set forth by this Court in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). Such reasons, whether expressed in the form of an opinion or findings, are essential for us to adequately evaluate this issue. Without them the appellate court is obliged, at least in part, to respond to the appeal on

the basis of "too little," "too much," or just about right." *Van Ooteghem* v. *Gray*, 628 F.2d 488 (1980).

Finding no error in the proceedings below on the issues of liability and damages, we AFFIRM those sections of the judgment. The district court failed to make adequate findings in fixing the amount of attorney's fees. We VACATE the award of $5,000 and REMAND for reconsideration of this one issue.

AFFIRMED in part; VACATED and REMANDED in part.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 79-3476

JAMES N. BROWN

Plaintiff-Appellee
Cross-Appellant,

VS.

BULLARD INDEPENDENT SCHOOL DISTRICT, ET AL,

Defendants-Appellants
Cross-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas

Before AINSWORTH and SAM D. JOHNSON, Circuit Judges, and HUNTER*, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel,

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part; and vacated in part; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this court; it is further ordered that the costs are rendered taxed against appellants and appellee by the Clerk of this Court.

March 25, 1981

Issued as mandate:

* HUNTER, United States District Judge of the Western District of Louisiana, sitting by designation.

APPENDIX C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 79-3476

JAMES N. BROWN

Plaintiff-Appellee
Cross-Appellant,

VS.

BULLARD INDEPENDENT SCHOOL DISTRICT, ET AL,

Defendants-Appellants
Cross-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas

ON PETITION FOR REHEARING
(APRIL 17, 1981)

Before AINSWORTH and SAM D. JOHNSON, Circuit Judges, and HUNTER,* District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and number cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ ROBERT A. AINSWORTH
United States Circuit Judge

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* Senior District Court Judge from the Western District of Louisiana, sitting by designation.

Office-Supreme Court, U.S.
FILED
JUN 29 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-2000

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BULLARD INDEPENDENT SCHOOL DISTRICT, ET AL.,
Petitioners,

v.

JAMES N. BROWN,
Respondent.

RESPONSE AND MOTION TO AFFIRM JUDGMENT OF COURT OF APPEALS FOR THE FIFTH CIRCUIT

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III.
CONSTITUTIONAL AND STATUTORY PROVISIONS

A. The First Amendment to the United States Constitution, in pertinent part, provides:

> "Congress shall make no law... abridging the freedom of speech... or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

B. The Fourteenth Amendment to the Constitution has been interpreted to make the First Amendment applicable to the states. It reads:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

C. 42 U.S.C. § 1983 provides as follows:

> "Every person who, under color of any statute... of any State or Territory, subjects, or causes to be subjected, any citizen of the United States... to the deprivation of any rights, privi-

leges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress."

NO. 80-2000

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BULLARD INDEPENDENT SCHOOL DISTRICT, ET AL.,
Petitioners,

v.

JAMES N. BROWN,
Respondent.

RESPONSE AND MOTION TO AFFIRM JUDGMENT OF COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE CASE

James Brown brought this action under 42 U.S.C. § 1983 against various state officials including his principal, superintendent and trustees of the Bullard Independent School District. Brown alleged that the defendants placed him on probation, giving him the

first negative evaluation of his teaching career. They then recommended that he not be rehired and voted not to rehire him. All of these adverse actions were taken because of his exercise of speech protected by the first amendment (Tr. 78-82).

The case was tried before a jury. A verdict for Brown was entered in response to four special interrogatories. Basically, the jury found that: (1) the non-renewal violated Brown's first amendment rights; (2) Irby and Coffey were not entitled to "good-faith" immunity; (3) the trustees voting not to renew the contract were not entitled to the "good-faith" immunity; and (4) Irby and Coffey acted with malice toward Brown. The jury awarded damages to Brown.

Respondent strongly contests the statement of facts set forth in the Petition for Writ of Certiorari and has incorporated his version of the facts in the Argument.

ARGUMENT

I. RESPONDENT'S COMMENTS ARE CONSTITUTIONALLY PROTECTED.

The application for writ of certiorari should be denied because dispositon is controlled by the legal principles established in *Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410 (1979). Whether respondent's comments are constitutionally protected involves an application of the balancing test set forth in *Pickering* v. *Board of Education*, 391 U.S. 563 (1979). "The problem in any case is to arrive at a balance between the interests of

the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering* at 568.

Although the issue of whether Brown's comments are constitutionally protected was probably not properly preserved [1], respondent suggests that the trial court correctly determined that Brown's speech is protected. The trial court instructed the jury that the private comments made by Brown "which related to the conditions of his employment, and remarks ... made at a faculty meeting on November 18th, 1976 ... are protected First Amendment activities" (Tr. 522). Over respondent's objection [2], the trial court submitted to the jury not only the *Mt. Healthy* defense issues, but also the disruption issues.

> If you find that the remarks of the Plaintiff at the November 18th, 1976 faculty meeting were directed at the judgment of Plaintiff's superior which would disturb the harmony in the administration and teaching staff of the School District, then such remarks do not require the retention of the teacher under the guise of freedom of speech.

[1] Petitioner objected on *Mt. Healthy* grounds to the instruction: "[T]here is no evidence ... that such ... activities in the absence of sufficient evidence ... were the motivating cause of the conduct" (Tr. 537). Petitioner did not object on the grounds that the comments were not protected speech.

[2] Respondent assumes that the application of the *Pickering* balancing test is a question of law. *See Schneider* v. *City of Atlanta*, 628 F.2d 915, 918 (5th Cir. 1980). Respondent objected to submission of the disruption issue to the jury (Tr. 534).

> However, in order to justify a decision not to renew a teacher's contract based upon the derisive [*sic*] effect of his speech, you must first decide if the speech had such an effect on the harmony of the school. If you find that Mr. Brown's speech adversely effected the harmony of the Bullard Independent School District, you may weigh that against the public interest served in allowing free debate (Tr. 524-525).

Thus the petitioner's claim that Brown's comments were nothing more than "bickering and running disputes" as discussed in *Chitwood* v. *Feaster,* 468 F.2d 359 (4th Cir. 1972), is a factual issue which was rejected by the jury. Likewise petitioner's claim that Brown's faculty meeting remarks were "made from a personal stance for perculiarly [*sic*] personal reasons with an isolated personal target (the superintendent) as its object" was impliedly rejected by the jury. (Petition for Writ of Certiorari 14).

Whether the faculty meeting comments are protected involves an evaluation of the content of the speech as well as the "manner, time, and place in which it was delivered." *Givhan* at 415 n.4. Brown's remarks at the faculty meeting dealt with the teacher evaluation policy utilized by the administration. The comments were made up at a meeting in which teachers were encouraged to "speak their peace" (Tr. 266).

Moreover the district's evaluation policies were a public issue. The superintendent testified that one

of his primary objectives was the development of a teacher evaluation policy (Tr. 239). Discussions regarding the terms and conditions of employment of public employees have traditionally been protected. *See City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976). It is significant that at the time of the faculty meeting, Brown had not received a negative teacher evaluation. His comments, then, could *not* have been personally defensive or motivated. His remarks were on behalf of and for the benefit of his co-employees. Such activity by public employees in Texas has been accorded statutory protection. Vernon's Ann.Civ.St. art. 5154c §6.

Each of the other comments made by Brown, in private conversations with Irby or Irby and Coffey, in balance and in context, is reasonable in manner, time, and place of presentation. One of the most widely recognized areas of protected activity is the right to speak and petition the government for redress of grievances. *See* Emerson, T., *The System of Freedom of Expression* 570-581 (1970). If anything, a citizen has the right to criticize a government official's conduct of the public's business. *Garrison* v. *State of Louisiana*, 379 U.S. 64 (1964). Brown then as a citizen had the right to comment upon[3] the actions and policies of the government official delegated the responsibility by the Board of

[3] Some commentators suggest that the public employees' right to criticize may be founded in an expanded notion of academic freedom. *See* Schauer, *"Private" Speech and the "Private" Forum: Givhan v. Western Line School District*, 1979 S.Ct.Rev. 243-249.

Education of making day-to-day decisions concerning the public's business. The superintendent even conceded that Brown's criticism of him for showing favoritism toward his own daughter was justified. [4] With regard to the Dairy Maid incident, Brown explained that the incident merely showed a lack of effective communication between the superintendent and his principals (Tr. 86-88). Brown also criticized Irby for living at a country club rather than residing in the rural community where he was employed (Tr. 111). Finally, Brown called Irby an "autocrat" in an admittedly heated discussion which occurred after Irby had placed Brown on probation the day after Brown's faculty remarks (Tr. 121, 122).

In context, each of these remarks and comments reflects Brown's concern as a citizen for the promotion of egalitarian values and norms in the public school system at Bullard. Although petitioner continues to claim that the remarks had the effect of disrupting the harmony of the school, there is abundant evidence to the contrary. In considering whether the remarks and comments posed a threat to internal discipline or harmony among co-workers or jeopardized a close working relationship with an immediate supervisor, the jury was required to examine the context of each remark.

The comments did not adversely affect the school's performance of a public service because they were

[4] Irby had his own daughter and her best friend excused from Brown's class in order to participate in a private show by a magician on school premises. After the show the two children, predictably excited, disturbed the class (Tr. 83-85).

delivered in a manner which posed no threat to internal discipline. All but the remarks regarding the teacher evaluations were made privately by Brown to Irby or Irby and Coffey so the teachers had no reason to know about most of Brown's remarks. When Brown indicated disapproval of Irby's residence and lack of communication with the principal, it was during a private conversation in Irby's office. In fact, Irby specifically asked Brown for his opinion of Irby's administration and solicited Brown's opinion on how to improve it (Tr. 110). Brown's criticisms regarding the magician were made privately to Irby and Coffey (Tr. 85). Brown's criticism of the bus route was made privately to Irby (Tr. 81-82).

Finally, Brown's criticisms should not have jeopardized his working relationship with his supervisors. Irby encouraged Brown to comment on his administration during their May 1976 meeting (Tr. 110). Irby encouraged teachers to speak out during faculty meetings (Tr. 266). Irby told his teachers that he maintained an open door policy (Tr. 94). Once the administration opened its door, it could not object that an employee had a poor attitude simply because he voiced criticisms.

In sum, Brown's criticisms were all made in an appropriate time and place and in a reasonable manner. His criticisms seem especially reasonable when one considers that the court in *Givhan* was willing to consider Givhan's speech as being potentially protected under the first amendment even though Givhan's speech was accompanied by such potentially harmful activity as "downgrading" the

papers of white students, walking out of a meeting about desegregation and attempting to disrupt it by blowing automobile horns, threatening not to work and protecting a student during a weapons shakedown by concealing the student's knife.

II. THE "EVEN PARTIALLY" INSTRUCTION UNDER THE CIRCUMSTANCES IS HARMLESS ERROR.

The submission of the "even partially" instruction must be viewed in light of the entire charge, the allegations in the complaint, the evidence presented, and the arguments of counsel to determine whether the jurors were misled and misunderstood the issues. *First Virginia Bankshares* v. *Benson,* 599 F.2d 1307 (5th Cir. 1977), *cert. denied,* 435 U.S. 952 (1978).

The charge as a whole complies with *Mt. Healthy City Board of Education* v. *Doyle,* 429 U.S. 274 (1977). Therein the Court set out the respective burdens of the parties:

> Initially . . . the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor" — or to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemploy-

> ment even in the absence of the protected conduct. 429 U.S. at 287.

Herein the trial court instructed the jury as follows:

> The effect of this protection is that the Bullard Independent School District, its Superintendent or its junior high Principal cannot legally retaliate in any way against James Brown for the exercise of these protected First Amendment rights by placing him on probation or refusing to renew his employment contract in retaliation for Mr. Brown's exercise of his protected First Amendment rights. In other words, if (the defendants) took actions which were taken because James Brown exercised his First Amendment activities or even partially for that reason, the Defendants acted illegally.
>
> If James Brown's actions or statements in connection with his protected First Amendment activities were a substantial or motivating factor in any of the decisions... then the Defendants acted illegally and contrary to the Constitution of the United States. The burden of proof in this connection is on the Plaintiff... to prove his allegations to you by a preponderance of the evidence.
>
> On the other hand, if (the defendants) can establish that the action which they took with reference to James Brown would have been taken in any event; that is, even if he had

> never made those remarks on November 18th, 1976, or had any conversations regarding his employment with Mr. Irby; then there is no violation of the law. In this connection, however, the burden of proof is on the Defendants to prove by a preponderance of the evidence that they would have acted just as they did had James Brown never engaged in protected First Amendment activities that I have listed to you in this Charge (Tr. 522-524).

Petitioner argues that inclusion of the language "even partially" and "illegally" set too low a level of proof resulting in fundamental error. The record herein simply does not support petitioner's position. It was respondent's position throughout the trial that the sole basis for his non-renewal and probation was his protected activities, not his teaching abilities or performance of duties.

The court explained the contentions of respondent as follows:

> Specifically, Mr. Brown contends that remarks he made at a meeting of November 18th, 1976, and remarks he made to Mr. Irby prior to that time which related to conditions of employment, were the motivating factor behind the ultimate decision not to renew his contract (Tr. 520).

The evidence amply supports respondent's theory of the case. Irby testified that after the faculty meeting he met with his two principals. He asked the principals if Brown would make a good teacher.

"Both of them said no, he's against the administration. He's fighting us tooth and nail." Then Irby said that "I think maybe what we ought to do is place him on probation so that he will realize what we're really trying to do..." (Tr. 303). Irby also testified that Brown's actions during the faculty meeting prompted him to place Brown on probation because "it reminded me... that this is the man I had talked to much earlier, and I needed to and had told him so that I would evaluate him in the fall..." (Tr. 305).

Witness Parmley testified that Irby told him that "we cannot tolerate this type of action like we had at the faculty meeting..." (Tr. 208). Brown testified that after the faculty meeting he was called in for a conference by Irby who stated: "Mr. Brown, you've been called in because of the outburst in yesterday's faculty meeting." Irby also told Brown during that conference that he was going to be placed on probation because of the remarks (Tr. 118).

The district's primary defense was that Brown opposed the administration (Tr. 303) and was defiant of authority (Tr. 286). All of the trustees cited Brown's negative attitude as the main reason for the non-renewal (Tr. 374, 413, 415, 425). The district produced considerable testimony that Brown's teaching was deficient and that he failed to maintain discipline and control. Brown, however, produced substantial and persuasive testimony to the contrary.

Prior to the faculty meeting, Brown had not received any negative evaluations or any significant

criticisms of his teaching performance (Tr. 63, 73, 76, 78, 468). No written complaints had been placed in his file prior to the faculty remarks (Tr. 300, 335). Brown testified that he was very familiar with the class material and planned daily (Tr. 62). He also testified that he taught the same courses and the same material all three years (Tr. 62-63). He used teaching aids when necessary and maintained bulletin boards and posters (Tr. 473).

Concerning complaints by parents about his teaching, Irby told Brown at the May 1976 evaluation that he had received no more complaints about Brown than any other teacher (Tr. 187). Two teachers testified in support of Brown. Nicholson and Jeeter testified that Brown's students were well prepared for seventh grade work (Tr. 451, 459). Neither ever received any complaints from their students about Brown and both considered Brown to be proficient (Tr. 451, 463).

Thus the evidence presented supports an implied finding that the protected activity rather than alleged teaching deficiencies was a substantial or motivating factor in the personnel action taken against Brown.

The arguments of counsel similarly amplify the instructions of the court. In the opening statement Counsel for respondent argued that:

> . . . we submit to you that Mr. Brown was placed on probation by Mr. Irby and Mr. Coffey in November of 1976, that he was given a negative evaluation at that time, that he was given a

> negative evaluation in February of 1977, that he was recommended not to be rehired in March of 1977, and in fact was not rehired in March of 1977, for impermissible reasons. He was not rehired and all of those adverse actions were taken against Mr. Brown we submit, and we think that the evidence will prove to you, because of his exercise of his First Amendment Right — freedom of speech (Tr. 30-31).

Counsel for petitioners contended throughout its argument that the various comments made by Brown in private conversations and at the faculty meeting indicated that Brown had a "deep seated", "almost irrational", resentment of the administration (Tr. 498). Further petitioners' counsel argued that Brown was "confronting his boss" (Tr. 500) and had "attacked Phil Irby" (Tr. 501).

Counsel then tried to minimize the importance of Brown's remarks during the faculty meeting by arguing that:

> . . . I know that a man like Mr. Irby here who has heard this man call him an autocrat, who has heard this same man accuse him of all sorts of misdeed, and he is an employee of his, right there in that little School District, is not going to take any drastic action solely because of some remark at a faculty meeting that the administration was nit-picking (Tr. 504).

In rebuttal, respondent's counsel closed with these comments:

> You've heard Mr. Brown a lot, and if you really feel that Mr. Brown is that kind of a man, and that he had this deep seated anti-authoritarianism, that deep seated resentment that Defendants would have you believe, then we concede we shouldn't get a judgment, because that's the issue in this case. The issue is not Mr. Brown's resentment. The issue is who is telling the truth here (Tr. 513).

During the rebuttal phase of the trial, Brown responded to the many claims made against him by the defendants as follows:

> All the kids — of course, students that age, 9 or 10 years old, sixth grade students, have a tremendous sense of fairness, and if you're not fair to them, they're going to know it. And my students would tell me, and as far as discipline, I think they all understood that there were certain limits that they could take, and if they went too far, well, they knew that I'd get the board and bust them with it... but I don't believe that as a teacher you are there to tell so much, as you are there to have them discover. That's kind of my idea about it. Sometimes my room was noisy I'll agree, but it was never out of control (Tr. 473).

So, in the final analysis, an East Texas jury of peers made some credibility judgments and resolved conflicting testimony in Brown's favor. It was this process, we submit, not the court's "even partially" or "illegal if taken" submissions which carried the case for Brown.

PRAYER

Therefore respondent prays that the petition for writ of certiorari be denied or in the alternative, that judgments of the court below be affirmed and that respondent recover his costs and attorneys' fees and for such other and further relief to which he may justly be entitled at law or in equity.

Respectfully submitted,

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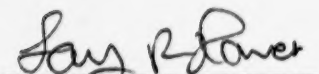
By: 
Larry R. Daves

ON THE PAPERS:
Margaret D. Burkhart

CERTIFICATE OF SERVICE

I, Larry R. Daves, hereby certify that a true and correct copy of the foregoing has been deposited in the United States Mail, postage prepaid, on this the 26th day of June, 1981, to: Michael A. Hatchell, Esq., P. O. Box 629, Tyler, Texas 75710.

By: Larry R. Daves
Larry R. Daves